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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 217

E. F. HORNER,

Petitioner,

vs.

THE COUNTY OF WINNEBAGO AND A. R. CARTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, SECOND DISTRICT, OF THE STATE OF ILLINOIS AND SUPPORTING BRIEF.

JOHN R. SNIVELY,
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Rockford, Illinois,
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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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THE COUNTY OF WINNEBAGO AND A. R. CARTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, E. F. Horner, respectfully represents, as follows:

This action was brought by E. F. Horner, plaintiff, against The County of Winnebago and A. R. Carter, defendants, in the Circuit Court of Winnebago County, Illinois, to recover damages of $25,000.00 for trespass to real property.

The complaint, filed August 3, 1945, alleges a continuing trespass. It states in substance that in the year 1930, the defendants broke and entered the land of the plaintiff and seized and appropriated a part thereof, that from said date until the commencement of the action they used and maintained the same as a part of a public street or highway, and that it was without the consent of the plaintiff and

without the institution of any proceedings, or the award of any compensation for the land taken or for the damage to the land not taken.

The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations. At the hearing of the motion, the plaintiff presented an affidavit denying the purported facts alleged. Although disputed questions of fact were involved and the plaintiff demanded that the issues be submitted to a jury, the trial court did not deny the motion without prejudice as required by the laws of the State of Illinois, but it granted the motion. The suit was dismissed and judgment was rendered for the defendants.

From the judgment for the defendants, the plaintiff appealed to the Supreme Court. It held that there was no freehold involved, and the case was transferred to the Appellate Court, Second District.

On September 18, 1947, the Appellate Court affirmed the judgment of the trial court, and on February 3, 1948, a petition for rehearing was denied.

On March 12, 1948, a petition for leave to appeal from the Appellate to the Supreme Court was filed in the Supreme Court, and on May 13, 1948, the petition was denied, upon which date the judgment of the Appellate Court became final.

This application is made for a review on writ of certiorari of the judgment of the Appellate Court which is the highest court of the state in which a decision could be had.

Jurisdiction.

The judgment of the Appellate Court became final May 13, 1948.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code.

The federal questions sought to be reviewed were raised in the pleadings in the trial court and in effect by the assignment of errors and argument, and the petition for rehearing, in the Appellate Court.

As heretofore shown, the complaint alleges a continuing trespass (Rec. 1-7). The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations (Rec. 7-13). All facts well pleaded in the complaint are admitted by a motion to dismiss. As a result thereof, the continuing trespass was admitted by the defendants. They also admitted that the land was taken without the consent of the plaintiff and without the institution of any proceedings, or the award of any compensation for the land taken or for the damage to the land not taken.

At the hearing of the motion, the plaintiff presented an affidavit denying the purported facts alleged (Rec. 13-14). Although disputed questions of fact were involved and the plaintiff demanded that the issues be submitted to a jury, the trial court did not deny the motion without prejudice as required by the laws of the State of Illinois, but it granted the motion (Rec. 14-15). The trial court held that the statute of limitations was applicable to the cause of action and that it was barred. The suit was dismissed and judgment was rendered for the defendants.

The same issues were raised in the Appellate Court. It also held that the statute of limitations was applicable.

The questions involved are real and substantial. They

are not frivolous, but require analysis and exposition for their decision. The rights which are secured by the Constitution of the United States and the Constitution and laws of the State of Illinois were specially set up and claimed by the petitioner, and were denied him. The rulings of the courts were of such a nature to bring this case within the statutory provision believed to confer jurisdiction on this court.

Questions Presented.

1. Did the state deprive the petitioner of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States by taking the same for public use without compensation?

2. Did the state deny to the petitioner the equal protection of the laws by the failure of the trial court to deny the motion to dismiss without prejudice and to submit the issues to a jury as required by the laws of the State of Illinois?

3. Did the state deny to the petitioner the equal protection of the laws by the Appellate Court ignoring or overlooking the principles relative to a continuing trespass which are stated in the case of *Lake Shore Building Co.* v. *City of Chicago*, 207 Ill. App. 244, and which are applicable to the instant case?

4. Did the state deprive the petitioner of his property without due process of law, and deny to him the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States?

Reasons Relied on for the Allowance of the Writ.

As stated in the rules, a review on writ of certiorari is not a matter of right, but of sound judicial discretion. In the instant case, there are special and important reasons for allowing the writ.

The Appellate Court has decided a matter of substance not heretofore decided by this court. It also has decided it in a way not in accord with applicable decisions of this court.

The taking of private property by the state for public use without compensation violates the 14th Amendment to the Constitution of the United States.

On a motion to dismiss where disputed questions of fact are involved in an action at law and the opposite party demands that the issues be submitted to a jury, the trial court shall deny the motion without prejudice. Its failure to do so denies such party the equal protection of the laws and deprives him of his property without due process of law.

The decision of the Appellate Court that the statute of limitations is applicable to the cause of action denies to the petitioner the equal protection of the laws. The principles relative to a continuing trespass which are stated in the case of *Lake Shore Building Co.* v. *City of Chicago* and which are applicable to the instant case, were ignored or overlooked by the court.

Prayer.

Wherefore, your petitioner prays that this Honorable Court grant certiorari to review the judgment of the Appellate Court, Second District, of the State of Illinois, and that upon the hearing, the judgment of the Appellate Court may be reversed and the cause remanded with directions.

E. F. Horner,
Petitioner,
By John R. Snively,
His Attorney.

BRIEF.

The Opinions Below.

The opinion of the Supreme Court relative to a freehold is reported in 396 Ill. 382, 71 N. E. (2d) 698.

The opinion of the Appellate Court is reported in 332 Ill. App. 217, 74 N. E. (2d) 728.

There was no opinion of the Supreme Court when the application for leave to appeal from the Appellate to the Supreme Court was denied.

Jurisdiction.

The jurisdiction of this court is invoked because a title, right, privilege or immunity is specially set up or claimed by the petitioner under the Constitution of the United States. The state deprived the petitioner of his property without due process of law, and denied to him the equal protection of the laws.

Statement of the Case.

In the year 1930, and for a long time prior thereto, E. F. Horner was the owner and lawfully possessed of certain land situated in the Town of Roscoe, in the County of Winnebago and State of Illinois. The land fronted and abutted upon a certain public street or highway known as River Street and also as State Aid Road No. 16.

Prior to the year 1930 the public street or highway had been used by the public as a highway and had so existed for more than sixty years. The County of Winnebago and A. R. Carter in the fall of 1930 broke and entered into and upon the land, removed the fence which was along the public street or highway, and seized and appropriated a part thereof. The part, so seized and appropriated as aforesaid, was a parcel fifty feet in width along the southerly side thereof. Prior to the time of committing the acts described, the land was level with and on the same grade as the public street or highway, and the plaintiff had full, complete and unimpaired access to, and egress from, the land. The defendants changed or altered the direction or course and the grade of the public street or highway. They excavated and lowered the grade to a depth of eight feet below the grade as it had existed prior thereto. As a result thereof, the access to, and egress from, the land and the improvements thereon, was cut off and destroyed.

From 1930 until the commencement of the action, the defendants used and maintained said part of said land as a part of the altered public street or highway. The public street or highway was changed or altered as aforesaid without the consent of the plaintiff and without the institution of any proceedings. The defendants also changed or altered the public street or highway without awarding any

compensation to the plaintiff for the land taken or for the damage to the land not taken. The plaintiff was deprived of the land and of the occupation and use thereof and sustained damages in the sum of $25,000.00.

The complaint, filed August 3, 1945, consisted of five counts. It alleges a continuing trespass.

A demand for a jury also was filed.

The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations. At the hearing of the motion, the plaintiff presented an affidavit denying the purported facts alleged. Although disputed questions of fact were involved and the plaintiff demanded that the issues be submitted to a jury, the trial court did not deny the motion without prejudice as required by the laws of the State of Illinois, but it granted the motion. The suit was dismissed and judgment was rendered for the defendants.

From the judgement for the defendants, the plaintiff appealed to the Supreme Court. It held that there was no freehold involved, and the case was transferred to the Appellate Court, Second District.

On September 18, 1947, the Appellate Court affirmed the judgment of the trial court, and on February 3, 1948, a petition for rehearing was denied.

On March 12, 1948, a petition for leave to appeal from the Appellate to the Supreme Court was filed in the Supreme Court, and on May 13, 1948, the petition was denied, upon which date the judgment of the Appellate Court became final.

This application is made for a review on writ of certiorari of the judgment of the Appellate Court which is the highest court of the state in which a decision could be had.

Specification of Errors.

1. The trial court erred in granting the motion to dismiss the action.

2. The trial court erred in failing to submit the issues raised by the disputed questions of fact to a jury as required by the laws of the State of Illinois.

3. The trial court erred in not denying the motion to dismiss without prejudice.

4. The trial court erred in deciding that the statute of limitations was applicable to the cause of action.

5. The trial court erred in depriving the petitioner of his right to trial by jury.

6. The trial court erred in dismissing the action and rendering judgment for the defendants.

7. The Appellate Court erred in deciding that the statute of limitations was applicable to the cause of action.

8. The Appellate Court erred in not applying the principles relative to a continuing trespass which are stated in the case of *Lake Shore Building Co.* v. *City of Chicago,* 207 Ill. App. 244, which are applicable to the instant case, and thereby denied to the petitioner the equal protection of the laws.

9. The Appellate Court erred in depriving the petitioner of his property without due process of law in violation of the Constitution of the United States and the Constitution and laws of the State of Illinois.

10. The Appellate Court erred in affirming the judgment of the trial court.

11. Each of the assigned errors and the entire proceeding manifest a depriving of property without due process of law and a denial to the petitioner of the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

Argument.

The County has the power to exercise the right of eminent domain to construct roads. Existing roads may be altered, vacated or widened as provided by law. (Ill. Rev. Stat. 1947, Chap. 121, Par. 81.) Such a right or rights, however, were not exercised.

While the County may construct roads, it only can do so by making compensation to those who are deprived of their land as provided by the Constitution and laws of the State of Illinois. (Constitution of Illinois, Art. II, Sec. 13.) A taking of private property by the County for public use without compensation is a trespass and deprives the owner of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States as much so as the taking by a railroad company to construct its road without compensation. (*Toledo v. P. W. R. Co. v. Darst*, 61 Ill. 231.) Where the power to take exists, it must be exercised as provided by law. If it is not, a corporation, such as the County, so taking becomes a trespasser and may be proceeded against as such.

Not only were the acts of the defendants in seizing and appropriating a part of the land of the plaintiff and using the same for a public street or highway unlawful and in violation of the 14th Amendment to the Constitution of the United States, but they constitute a continuing trespass. This is not an action for a single trespass, but a series of trespasses or a continuing trespass to real property which constitutes an unlawful taking and use of the land. Damages are claimed, however, for a temporary injury, the loss of the occupation and use of the land, and not a permanent injury. A trespasser can restore possession to the owner at any time. It will not be presumed that the trespass will be continued.

The defendants had no right to the property which they seized and appropriated. No one would contend, because a trespasser has seized and appropriated land for a period of fifteen years, when a suit was brought to recover damages for trespass, that the owner could not recover such damages. Where the acts of the wrongdoer involve a course of conduct which is a direct invasion of the rights of another, such conduct is a continuing trespass. (52 Am. Jur. 849.)

In *Lake Shore Building Co.* v. *City of Chicago*, 207 Ill. App. 244, the court said:

> "Where a person unlawfully places a structure of any kind upon the premises of another, he commits a trespass. Such a trespass, by the great weight of authority, is a continuing one, even though the obstruction may, in a physical sense, be considered as of a permanent character, such as a railroad (*Chicago & I. R. Co.* v. *Hopkins*, 90 Ill. 316; *Adams* v. *Hastings & P. R. Co.*, 18 Minn. 236 (260); *Smith* v. *Chicago A. & St. L. R. Co.*, 67 Ill. 191); a subterranean water tunnel (*City of Chicago* v. *Troy Maundry Machinery Co.*, 162 Fed. 678); or telephone, telegraph and electric light equipment (*Carpenter* v. *Capital Electric Co.*, 178 Ill. 29; *Burrall* v. *American Telephone & Telegraph Co.*, 224 Ill. 266).

As heretofore shown, the complaint alleges a continuing trespass. The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations. All facts well pleaded in the complaint are admitted by a motion to dismiss. (*Schuler* v. *Board of Education*, 370 Ill. 107, *People* v. *Holten*, 259 Ill. 219, *Canal Comr's* v. *Village of East Peoria*, 179 Ill. 214.) As a result thereof, the continuing trespass was admitted by the defendants. They also admitted that the land was taken without the consent of the plaintiff and

without the institution of any proceedings, or the award of any compensation for the land taken or for the damage to the land not taken. The statute of limitations is inapplicable to a continuing trespass. (*Maton Bros., Inc.* v. *Central Illinois Public Service Company,* 269 Ill. 99, aff. 356 Ill. 584.) The trial court and the Appellate Court erred in deciding that the statute of limitations was applicable to the cause of action.

The Constitution of the United States provides, as follows:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

There is a similar provision relative to due process in the Constitution of the State of Illinois.

The Constitution and laws of the State of Illinois also provide, as follows:

> "Private property shall not be taken or damaged for public use without just compensation."

No condemnation proceeding was instituted by the County to take any of the land of the plaintiff for a public street or highway. It is inconceivable that the defendants can unlawfully take and use such land without due process of law. Such confiscatory acts strike at the roots of the fundamental rights that are guaranteed by the Constitution of the United States and the Constitution of the State of Illinois, leaving them valueless, and will result in tyranny and oppression. The Constitution and laws of the State of Illinois give a right of action against the County. This right, however, was denied to the plaintiff by the state courts and a grave injustice was done to him.

No compensation was awarded or paid to the plaintiff for

the land taken or for the damage to the land not taken. Even a condemnation, upon due proceedings, will not deprive the owner of his title or right to possession or of alienation, without payment of the amount awarded by the jury. The last act must be performed before the law will regard the land as lawfully taken or acquired. (*Chicago & I. R. Co.* v. *Hopkins,* 90 Ill. 316.) As a result thereof, the petitioner was deprived of his property without due process of law.

If disputed questions of fact are involved the trial court may deny a motion to dismiss without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issues be submitted to a jury. (Ill. Rev. Stat. 1947, Chap. 110, Par. 172.) The affidavits and the facts well pleaded in the complaint showed that disputed questions of fact were involved. The action is one at law and the plaintiff demanded, as previously demanded in writing, that the issues be submitted to a jury. The trial court erred in granting the motion to dismiss the action. The trial court erred in failing to submit the issues raised by the disputed questions of fact to a jury as required by the laws of the State of Illinois. The trial court erred in not denying the motion to dismiss without prejudice. The trial court erred in depriving the petitioner of his right to trial by jury. The trial court erred in dismissing the action and rendering judgment for the defendants. As a result thereof, the petitioner was denied the equal protection of the laws.

In its opinion the Appellate Court said, "Appellant has cited no case as sustaining his contentions that the statute of limitations should not apply in this case." The case of *Lake Shore Building Co.* v. *City of Chicago,* 207 Ill. App. 244, however, was cited in his brief. The principles relative to a continuing trespass which are stated in this case are applicable, controlling and decisive of the instant case.

It is a complete answer to the contentions made by the opposing parties. This case was ignored or overlooked by the Appellate Court. The Appellate Court erred in not applying the principles relative to a continuing trespass which are stated in said case and which are applicable to the instant case. As a result thereof, the petitioner was denied the equal protection of the laws.

For the reasons stated, the Appellate Court erred in affirming the judgment of the trial court.

Each of the assigned errors and the entire proceeding manifest a depriving of property without due process of law and a denial to the petitioner of the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

Conclusion.

This case involves substantial federal questions. Important principles of constitutional law were ignored or overlooked by the state courts. The petitioner was deprived of his property without due process of law, and was denied the equal protection of the laws. There has been a most flagrant and unwarranted violation of the Constitution of the United States and the Constitution and laws of the State of Illinois.

This court should take jurisdiction in order that justice may be done.

Respectively submitted,

JOHN R. SNIVELY,
Attorney for Petitioner.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, SECOND DISTRICT, OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PETITIONER.

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THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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REPLY BRIEF OF PETITIONER.

A.

The petition alleges that the federal questions sought to be reviewed were raised in the pleadings in the trial court, and in effect by the assignment of errors and argument, and the petition for rehearing, in the Appellate Court. The respondents contend that the petitioner has not specified what pleading raised the question.

The complaint alleges a continuing trespass to real property. It states, in substance, that in the year 1930, the defendants broke and entered the land of the plaintiff and seized and appropriated a part thereof, that said part so

seized and appropriated is a parcel 50 feet in width along the southerly side, fronting upon a public street or highway known as River Street and also as State Aid Route 16, that the defendants changed or altered the direction or course and the grade of said public street or highway, or a part thereof, so that said public street or highway, or a part thereof, passed over, across and upon said land, that from said date until the commencement of the action they used and maintained the same as a part of said altered public street or highway, and that said public street or highway was changed or altered without the consent of the plaintiff and without the institution of any proceedings so to do, or the award of any compensation for the land taken, or for the damage to the land not taken.

The Civil Practice Act provides that the first pleading by the plaintiff shall be designated a complaint. (Ill. Rev. Stat. 1947, Chap. 110, Par. 156.) The first pleading by the defendant shall be designated an answer. All objections to pleadings heretofore raised by demurrer shall be raised by motion. (Ill. Rev. Stat. 1947, Chap. 110, Par. 169.) Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, and he may within the same time, file a similar motion supported by affidavits where any of the following defects exist but do not appear upon the face of the complaint: * * * (e) That the cause of action is barred by a prior judgment. (f) That the cause of action did not accrue within the time limited by law for the commencement of the action or suit thereon. * * * If, upon the hearing of such motion the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may hear and determine the same and may grant or deny the motion; but if disputed facts are involved the court may deny the motion without prejudice and shall so deny it if

the action is one at law and the opposite party demands that the issue be submitted to a jury. (Ill. Rev. Stat. 1947, Chap. 110, Par. 172.)

In the instant case, the only pleading is the complaint. It contains a plain and concise statement of the pleader's cause of action. Not only does it state facts showing a continuing trespass to real property, but it states facts showing that private property was taken and damaged for public use without compensation.

The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations. The trial court granted the motion. The suit was dismissed and judgment was rendered for the defendants.

The rights that were specially set up and claimed by the petitioner, were denied to him. The state deprived the petitioner of his property without due process of law, and denied to him the equal protection of the laws. The decision is reviewable in this court.

In its opinion the Appellate Court set forth a statement of the case. It contains, in substance, the facts stated in the complaint. Among them is the statement that they (the defendants) have used and maintained plaintiff's land as a part of the altered public street or highway without his consent and without instituting any proceedings so to do. The Appellate Court recognized that the complaint stated a cause of action. It also recognized that no proceedings had been instituted to take any of the land of the plaintiff for a public street or highway.

The petition contains a summary and short statement of the matter involved, a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment in question, the questions pre-

sented, and the reasons relied on for the issuance of the writ. The statement particularly discloses the basis upon which it is contended that this court has jurisdiction. It specifies the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the court.

It appears affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

The respondents contend that the statute of limitations is applicable to the cause of action. In support thereof, they cite certain viaduct, sanitary district and railroad cases. (Resp. Brief, 9-10.) There is a marked and distinct difference between the causes of action in these cases and the cause of action in the instant case. These cases relate to actions to recover damages to adjoining and other lands resulting from the erection of permanent structures but the instant case is an action to recover damages for a continuing trespass to real property which consists of the unlawful taking and use of the same. In the instant case the trespasser can restore the land to the owner at any time. The cases cited are not applicable.

B.

The respondents contend that there were no disputed facts, as on a motion to dismiss all facts well pleaded are to be taken as admitted for the purpose of the motion. (Resp. Brief, 11.) The petitioner stated that all facts well pleaded in the complaint are admitted by a motion to dis-

miss. (Pet. Brief, 11.) The affidavits and the facts well pleaded in the complaint show that disputed questions of fact were involved. Inasmuch as disputed questions of fact were involved and the action was one at law and the plaintiff demanded that the issues be submitted to a jury, the trial court erred in granting the motion to dismiss.

It does not follow that because the Appellate Court did not discuss "other points raised by the appellant" that no disputed questions of fact were involved.

C.

This action was brought to recover damages for a continuing trespass to real property. The Appellate Court did not apply the principles relative to a continuing trespass which are stated in the case of *Lake Shore Building Co.* v. *City of Chicago,* 207 Ill. App. 244, and the cases therein cited. Although substantially conclusive effect is given to state court decisions upon the construction of state statutes, a federal question of substance is involved in the instant case. The equal protection of the laws is not achieved by and through the indiscriminate application of the statute of limitations.

As stated, the state court has decided a federal question of substance not heretofore determined by this court, and has decided it in a way not in accord with applicable decisions of this court. No cases have been cited because there have been no cases in point in this court. This court also needs no citation of cases that private property shall not be taken or damaged for public use without just compensation.

Conclusion.

Through all the years since 1930 the defendants have retained the land of the plaintiff. Although it has been used and maintained as a part of a public street or highway, no compensation or offer of the same has been made. The defendants have admitted the wrongful acts. No attempt has been made to justify such acts. Their principal defense has been the statute of limitations.

Every principle of right and justice demands that just compensation shall be made to the plaintiff. However, aside from all such considerations, the Constitution of the United States and the Constitution and laws of the State of Illinois have so declared and the mandate thereof must not be disregarded.

This court should take jurisdiction.

Respectfully submitted,

JOHN R. SNIVELY,
Attorney for Petitioner.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Appellate Court, Second District, of the State of Illinois, is reported at 332 Ill. App. 217; 74 N. E. (2nd) 728.

(It is presumed, although not set forth *in haec verba* in the abstract of record, that the opinion appears in the transcript of record as cited by the abstract of record. (Appellate Court Record 2, Abst. 16, and Supreme Court Record 2, Abst. 17.))

JURISDICTION.

The jurisdiction of this court is invoked by petitioner under Sec. 237 (b) of the Judicial Code. (Petition, 3.)

But the record presents several preliminary questions of jurisdiction and respondent, therefore, presents facts, authority and argument, obviating this court taking jurisdiction:

I.

Petitioner has not complied with United States Supreme Court Rule 38, Sec. 2, in that: (a) he has not disclosed the basis upon which it is contended this court has jurisdiction; (b) he has not specified the stage in the proceedings in the lower courts that a federal question was raised (Rule 12); (c) he has not set forth the manner of raising a federal question (Rule 12); (d) he has not set forth the way in which they were passed upon by the court (Rule 12); he has not set forth pertinent quotations of specific portions of the record as will support the assertion that the rulings were of a nature to confer jurisdiction in this court (Rule 12); but on the contrary, petitioner has made mere bland allegations of jurisdiction. (Petition, 3, 4.)

> "The decisions of this court not only have repeatedly held that a federal right in order to be reviewable here must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court as required by the state practice." *Louisville, etc., R. Co.* v. *Woodford* (Ky. 1915) 235 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202.

Petitioner has not shown as required by Rule 38, Sec. 5a, that a state court has decided a question of federal substance not therefore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court.

Petitioner has not even specified a question of federal substance conferring jurisdiction of this court (Petition, 3, 4) let alone not showing it was not theretofore decided by this court, and, in contravention of the alternative of the above rule, has cited no federal case!

> "Upon application to this court for review of the judgment of a state court it is the petitioners burden to show affirmatively that we have jurisdiction." *Gorman* v. *Washington University*, 62 S. Ct. 962, 316 U. S. 98-101; 85 L. ed. 1300.
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> "• • • it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it." *Southwestern Bell Teleph. Co.* v. *Oklahoma*, 303 U. S. 206, 212, 213; 82 L. ed. 751, 755. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner*, 139 U. S. 293, 295, 297, 35 L. ed. 193-195, 11 S. Ct. 528; *Whitney* v. *California*, 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1099, 1100, 47 S. Ct. 641; *Lynch* v. *New York*, 293 U. S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16.

Unless petitioner has had printed in the transcript of record the opinion of the court below he has not complied with Rule 38, Sec. 7. See opinions below. (Resp. Brief, 1.) (Not abstracted.)

II.

Because petitioner has not abstracted the opinion of the Appellate Court, Second District, of the State of Illinois, as a matter of convenience to this court, we repeat certain excerpts (*Horner* v. *County of Winnebago*, 332 Ill. App. 217, 221, 74 N. E. (2nd) 728):

> "There are other points raised by the appellant, which we need not discuss. Whether the suit brought by appellant was *res adjudicata*, or whether the plaintiff had lost title to the premises, we do not decide, as we are satisfied the court was correct in sustaining the motion to dismiss the suit, because the Statute of Limitations was applicable. The judgment of the trial court is hereby affirmed.
>
> Judgment affirmed."

Obviously, then, the decision of the state court was based on an interpretation of the State Statute of Limitations.

> "Substantially conclusive effect is given to State Court decisions upon the construction of state statutes." *Gormley* v. *Clark*, 134 U. S. 338, 350, 33 L. Ed. 909, 913. *Ridings* v. *Johnson*, 128 U. S. 212; *Bacon* v. *Northwestern M. L. Ins. Co.*, 131 U. S. 258.
>
> "Where the State Court based its judgment, not on a law raising a federal question, but on an independent ground, this court will not take jurisdiction of the case, even though it might think the position of the State Court an unsound one." *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; 32 L. ed. 125.
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> "Inasmuch as one of the defenses called for the construction and application of a State Statute in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the highest court of the State. *Gormley* v. *Clark*, 134 U. S. 338, 348." *Johnson* v. *Risk*, 137 U. S. 300, 309, 34 L. ed. 683, 686.
>
> "Even though a federal question was present, where a defense is distinctly made, resting on local statutes, this Court should not, in order to reach a federal ques-

tion, resort to critical conjecture as to the action of the court in the disposition of such defense." (Statute of Limitations) *Johnson* v. *Risk*, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686.

As the decision of the State Court rested, and may rest on an adequate non federal ground—the Illinois Statute of Limitations—the petition should be denied. *Richardson Machinery Co.* v. *Scott*, 276 Sup. Ct. Rep. 128, 133, 72 L. ed. 497, 500.

III.

Although petitioner has alleged (Petition, 3) that "federal questions sought to be reviewed were raised in the pleadings in the trial court and *in effect* by the assignment of errors and *argument;* and the petition for rehearing in the Appellate Court" he has not specified (Rule 12) what pleading raised the question; nor has the petitioner included in the record an assignment of errors, argument or petition for rehearing in the Appellate Court.

> "Jurisdiction (of the Supreme Court of the United States) cannot be founded on surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record." *Lynch* v. *New York ex rel Pierson*, 293 U. S. 52, 54, 79 L. Ed. 191, 193.
>
> "Attempt to raise a federal question after judgment, upon a petition for rehearing comes too late, unless the court actually entertains the question and decides it. *Herndon* v. *Georgia*, 295 U. S. 441-445, 79 L. ed. p. 1532-33; *Texas & P. R. Co.* v. *Southern P. Co.*, 137 U. S. 48, 54, 34, L. ed. 614, 617, 11 S. Ct. 10; *Loeber* v. *Schroeder*, 149 U. S. 580, 585, 37 L. ed. 856, 858, 13 S. Ct. 934; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181, 64 L. ed. 213, 214, 40 S. Ct. 116; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117, 67 L. ed. 556, 563, 43 S. Ct. 288; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 454, 455, 48 L. ed. 382, 387, 388, 44 S. Ct. 197, and cases cited."

Further, even though for the purpose of argument, it be considered that a federal question was raised, as the opinion of the Appellate Court of Illinois decided the cause on the Illinois Statute of Limitations, this court has repeatedly refused to take jurisdiction under such conditions.

> "Where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here." *Flournoy* v. *Wiener*, 321 U. S. 253-275, 88 L. ed. 708, 714. *Berea College* v. *Kentucky*, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 S. Ct. 33; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 163, 164, 61 L. ed. 644, 648, 649, 37 S. Ct. 318; *Lynch* v. *New York*, 293 U. S. 52, 54, 55, 79 L. ed. 191-193, 55 S. Ct. 16; *Fox Film Co.* v. *Muller*, 296 U. S. 207, 210, 211, 80 L. ed. 158-160, 56 S. Ct. 183.
>
> "As the case might properly have been determined upon a ground broad enough to support the judgment without resort to a federal question, this Court has no jurisdiction." *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297, 35 L. Ed. 193-195.

IV.

Petitioner under the heading "Jurisdiction" (Petition, 3) has set forth an argument, relative to the motion to dismiss, unsupported by any authority, which presents no federal question and which patently does not go to the question of jurisdiction.

Because there inserted in the petition, we beg the indulgence of the court in answering it under petitioner's designation "Jurisdiction."

> "Under the provisions of the Civil Practice Act a motion to dismiss takes the place of a demurrer as formerly employed. (Sec. 45, par. 169, ch. 110, Civil Practice Act, Ill. Rec. Stat. 1937 [Jones Ill. Stats. Ann. 104.045].) It does not admit conclusions or inferences

drawn by the pleader (*Lietzman* v. *Radio Station W. C. F. L.*, 282 Ill. App. 203, 208), and under the authorities of this State pleadings are to be construed strictly against the plaintiff." *Klein* v. *Chicago Title & Trust Co.*, 295 Ill. App. 208, 216.

"A demurrer involves only such facts as are alleged in the pleading demurred to and raises only questions of law as to the sufficiency of the pleadings which arise on the face thereof. (*Wood* v. *Papendick*, 268 Ill. 383.) In considering such questions the averments of the pleas must be construed most strongly against the pleader. (*Kelleher* v. *Chicago City Railway Co.*, 256 Ill. 454; *People* v. *Lanham*, 189 *id.* 326.) *Taylor* v. *Southern Ry. Co.*, 350 Ill. 139, 142.

"All facts material to the issue that are well pleaded are to be taken as admitted *for the purpose of the motion to dismiss.*" (*DePauw University* v. *United Elec. Coal Co.*, 299 Ill. App. 339, 346.

V.

Further, petitioner's argument for the jurisdiction of this court is obviously paradoxical for in Paragraph 4 (Petition 3) he alleges that facts well pleaded are admitted by a motion to dismiss for the purpose of said motion, but in Paragraph 5 (Petition, 3) he alleges *disputed* questions of fact were involved. As a matter of fact, there were no disputed questions of fact involved as the opinion of the Appellate Court (Resp. Brief, 4) shows that the cause was decided on the application of the Ill. Statute of Limitations and the affidavits referred to by petitioner (Petition, 3) raise the question of *res adjudicata* (Rec. 18-19, Abst. 11, 12) and whether plaintiff had lost title to the premises through prior foreclosure proceedings. (Rec. 20, Abst. 12, 13.)

Petitioner has failed to point out a federal question involved.

QUESTION PRESENTED.

There is only one question presented by the petition: Where a state court has decided a matter based on the application of a local statute, will this court take jurisdiction where no federal question appears?

ARGUMENT.

A review on writ of certiorari is not a matter of right. Rule 38, Sec. 5.

Although respondent has shown conclusively that petitioner has no right to a writ of certiorari based purely on petitioner's neglect to show a basis for this court to assume jurisdiction, as he has alleged jurisdiction, we must, of necessity, answer his argument.

Petitioner contends: (A) the state courts erred in deciding that the Statute of Limitations applied to the cause of action; (B) the state courts erred in not submitting the case to a jury because disputed facts were involved; and (C) the Appellate Court overlooked the case of *Lake Shore Building Co.* v. *City of Chicago*, 207 Ill. App. 244.

A. This argument with respect to jurisdiction has been answered. (Resp. Brief, 2, 3, 4, 5, 6, 7.)

However, in addition thereto we direct the Court's attention to decisions supporting the application of the Statute of Limitations.

Actions to recover damages for a seizure or taking of real property must be instigated within five years of the alleged seizure or taking.

Monarch Refrigerating Co. v. *Chicago*, 328 Ill. App. 546.

Schlosser v. *Sanitary District*, 299 Ill. 77.

Wheeler v. *Sanitary District*, 270 Ill. 461.

Shaw v. *Sanitary District*, 267 Ill. 216.

North Shore Street Railway Co. v. *Payne*, 192 Ill. 239.

Merodosia Lake District v. *Sanitary District*, 268 Ill. App. 93.

Where a permanent structure, such as a highway, legally authorized is built, in the absence of an allegation of improper or negligent construction, the act is not a continuing trespass, but all damage past, present and future are sustained when the structure is built and its operation begun and recovery must be in a single unit, and the statute of limitations begins to run on the completion of the structure.

Monarch Refrigerating Co. v. *Chicago*, 328 Ill. App. 546.

Schlosser v. *Sanitary District*, 299 Ill. 77.

Bernhardt v. *B. & O. Southwestern R. R. Co.*, 165 Ill. App. 408, 410.

Merodosia Lake District v. *Sanitary District*, 268 Ill. App. 93.

Christie v. *Sanitary District*, 256 Ill. App. 63.

North Shore Street Railway Co. v. *Payne*, 192 Ill. 239.

C. & E. I. R. R. v. *Loeb*, 118 Ill. 203.

Central R. R. Co. v. *Ferrell*, 108 Ill. App. 659, 667.

The complaint, in all counts, alleges a certain trespass in 1930. (Abst. 1-6.) Additional allegations are that in 1930 the direction of a public road, previously used for over sixty years, was altered by the defendants so as to pass over and across plaintiff's property, thereby committing a trespass. Petitioner is bound by his complaint. A permanent structure was built and it follows as a matter of law that if any trespass was committed as alleged, it occurred in 1930 and as no allegations of improper construction or operation were made, the statute of limitations begins to run upon completion of the structure (*Schlosser* v. *Sanitary District*, 299 Ill. 77; *North Shore Street Railway Co.* v. *Payne*, 192 Ill. 239).

By the additional allegations of alteration and change of grade and level, which plaintiff alleges occurred in the fall of 1930, the plaintiff places himself squarely within the rule laid down in the case of *Monarch Refrigerating Co.* v. *Chicago*, 328 Ill. App. 546. The court there held that the suit should have been brought within five years from the time the grades and streets had been changed and opened to traffic. The Supreme Court of Illinois denied leave to appeal in that case, 331 Ill. App. XIV.

B. There were no disputed facts, as on a motion to dismiss all facts well pleaded or to be taken as admitted *for the purpose of the motion.*

DePauw University v. *United Elec. Coal Co.*, 299 Ill. App. 339, 346.

We refer to and reiterate IV and V of Respondent's Brief (pp. 6, 7).

C. Petitioner admits that the case of *Lake Shore Building Co.* v. *City of Chicago*, 207 Ill. App. 224 was cited in his brief to the Appellate Court of Illinois. (Petition, 13.) In fact, it was again submitted and argued in petitioner's petition for rehearing in the Appellate Court which was denied. (Appellate Court Record 5, Abst. 16.)

Suffice it to say that not only does this not present a federal question, but it does not obviate the rule that "substantially conclusive effect is given to state court decisions upon the construction of state statutes." *Gormley* v. *Clark*, 134 U. S. 338, 350, 33 L. ed. 909, 913.

The Appellate Court of Illinois based its decision on the application of the Statute of Limitations. (Resp. Brief, 4.)

Conclusion.

We submit that petitioner has failed to show jurisdiction of this court and if any right of action accrued to petitioner, it accrued in the fall of 1930, and as the action was started August 3, 1945 (Rec. 2-8, Abst. 1) the Statute of Limitations of the State of Illinois applied and the judgment of the Appellate Court, Second District, was correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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